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No. 98-1628

In The

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

vs.

HAROLD DAWAVENDEWA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, Salt River Project, submits this supplemental brief to respond to the Solicitor General's brief for the United States as amicus curiae. The United States argues that review is not warranted because the Ninth Circuit correctly decided the issues in this case. However, the United States' analysis that leads it to that conclusion is fundamentally flawed.

I. THE UNITED STATES ERRONEOUSLY REJECTS THE RELEVANT ANALYTICAL FRAMEWORK.

The United States' analysis is fundamentally flawed because it explicitly rejects the analytical framework this Court created specifically for cases such as this. This Court has repeatedly held that when interpreting statutes which raise issues of tribal sovereignty or self-governance, "the standard principles of statutory construction do not have their usual force." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985). Instead,

> traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop" *against which vague or ambiguous federal enactments must always be measured.*
>
> . . . Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44, 100 S. Ct. 2578, 2583-84 (1980) (emphasis added).

It is beyond dispute that the Ninth Circuit's narrow interpretation of Title VII's Indian preference exemption has a substantial effect on tribal sovereignty and self-governance. Indeed, the Ninth Circuit's decision effectively restricts the Navajo Nation's sovereign power to regulate employment practices on trust property within its own reservation, through either tribal ordinances or lease provisions.[1] Moreover, the Ninth Circuit's decision also puts in doubt the validity of every similar lease provision and tribal employment rights ordinances used by any of the hundreds of federally-recognized Indian tribes throughout the nation.

Even though the effect of the Ninth Circuit's decision on fundamental principles of tribal sovereignty is both obvious and dramatic, the Ninth Circuit completely ignored the required analytical framework. It justified doing so with the clearly erroneous conclusion that

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[1] The regulation of employment practices on tribal lands is unquestionably part of a tribe's inherent sovereign power. *See Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1413 (1997) ("tribes retain considerable control over nonmember conduct on tribal land"); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (tribe's inherent sovereignty includes authority to enforce employment ordinances on employers doing business within the reservation, even when such employers are located on non-Indian fee land).

"Native Americans' interests in self-governance [are] interests not present in this case." Pet. App. 8a.

The United States does not even attempt to defend the Ninth Circuit's clearly erroneous conclusion. Instead, it contends the Ninth Circuit was correct in ignoring the relevant analytical framework for an entirely different reason. Specifically, the United States suggests the analytical framework need not be applied in this case because "Petitioner's proposed construction of the Indian preference exemption . . . is not limited to protecting preferences that promote tribal sovereignty." United States Brief at 13-14. However, the United States' alternative justification for ignoring this Court's analytical framework is as plainly erroneous as the Ninth Circuit's.

In the first place, the United States cites no authority in support of its attempt to evade application of the analytical framework in this context. Indeed, there is no such authority.

Moreover, this Court's special Indian law analytical framework always applies whenever the statute to be interpreted raises issues of tribal sovereignty and self-governance. *See White Mountain Apache Tribe*, 448 U.S. at 143, 100 S. Ct. at 2583 (the analytical framework is "an important 'backdrop' against which . . . federal enactments must *always* be measured") (emphasis added). If, when viewed against that "important backdrop," one of the competing interpretations of the statute does not "comport with . . . the federal policy of encouraging tribal independence" then the interpreting court may reject that interpretation as contrary to congressional intent. *Id.* at 144, 100 S. Ct. at 2584. Similarly, if (as the United States

argues here) one of the competing interpretations has a broader effect than merely promoting tribal sovereignty, then that characteristic may also be considered when determining how to construe the statute most consistently with Congress' intent. The point, however, is that such characteristics must always be viewed in the context of the applicable analytical framework; they are not a justification for abandoning the framework altogether.

Finally, by criticizing the Salt River Project's construction of the Indian preference exemption because it "is not *limited* to protecting preferences that promote tribal sovereignty," United States Brief at 13 (emphasis added), the United States concedes that construction does, in fact, promote tribal sovereignty. By contrast, the Ninth Circuit interpretation has just the opposite effect. It abrogates tribal sovereignty and reduces tribal independence by limiting the tribes' ability to control employment practices (through tribal ordinances or lease provisions) on their own reservation lands. The United States offers no explanation of how this Court's analytical framework – the very purpose of which is to safeguard and promote tribal sovereignty – can be made inapplicable by an interpretation that promotes tribal sovereignty, leaving in its wake an interpretation which destroys tribal sovereignty and independence.

II. THE UNITED STATES IMPROPERLY IGNORES THE UNDERLYING CONGRESSIONAL PURPOSE OF TITLE VII'S INDIAN PREFERENCE EXEMPTION.

The United States' analysis is also fundamentally flawed because it ignores this Court's characterization of Congress' purpose underlying Title VII's Indian preference exemption. Because the central issue in this case is the interpretation of that statutory exemption, the task at hand is to ascertain the intent of Congress and give effect to it. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S. Ct. 3245, 3250 (1982) ("Our task is to give effect to the will of Congress."). Yet, the United States makes no attempt to identify what Congress' underlying intent may have been.

The United States' silence is remarkable because this Court has already characterized the purpose underlying Congress' enactment of Title VII's Indian preference exemption (as well as the provision exempting tribes from Title VII's definition of "employer") as follows:

> This exemption reveals a clear congressional recognition, within the framework of Title VII, of the *unique legal status of tribal and reservation-based activities*. . . .
>
> . . . .
>
> . . . These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a *unique status to Indians in matters concerning tribal or "on or near" reservation employment.*

Morton v. Mancari, 417 U.S. 535, 545-46, 94 S. Ct. 2474, 2480-81 (1974) (emphasis added); *see also* 110 Cong. Rec. 13702 (1964) (commenting on both of Title VII's Indian exemptions, Senator Mundt asserted they would "assure our American Indians of the continued right to protect and promote their own interests. . . . "). Thus, the fundamental purpose of Title VII's Indian preference exemption – like that of the many other Indian employment preference laws Congress has enacted – is to assist "Indian tribes . . . to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. at 542, 94 S. Ct. at 2479.[2]

Because the United States does not bother to identify Congress' underlying purpose, it similarly fails to discuss whether, and how, the Ninth Circuit's interpretation comports with that purpose. This failure is also remarkable because the United States goes to the trouble of arguing that the Ninth Circuit's decision is consistent with the EEOC and other agency interpretations of the Indian preference exemption. United States Brief at 12-13. But it does not analyze whether that interpretation is consistent with Congress' intent[3] – the only intent that really matters when interpreting congressional enactments.

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[2] In stark contrast to this Court's statement of Congressional intent, the Ninth Circuit erroneously concluded that Congress' purpose was "to compensate for the effects of past and present unjust treatment" of Indians. Pet. App. 12a.

[3] The United States expresses its "doubt" that Congress intended certain results which allegedly may flow from the Salt River Project's construction of the statute, but does so without identifying any congressional purpose that might justify such a doubt. United States Brief at 11.

Had the United States analyzed the Ninth Circuit's decision in light of this Court's characterization of Congress' intent underlying Title VII's Indian preference exemption, the Ninth Circuit's error would have been apparent. The Ninth Circuit's narrow interpretation of that exemption does not promote the "unique" sovereign status of Indian tribes or their right to protect their own interests "in matters concerning tribal or 'on or near' reservation employment." To the contrary, the Ninth Circuit's construction abrogates tribal sovereignty and self-governance, and is therefore antithetical to Congress' intent.

III. THE UNITED STATES ERRONEOUSLY ATTEMPTS TO AVOID CONSIDERATION OF THE POLITICAL CLASSIFICATION ISSUE.

Finally, the United States' analysis is also flawed because it mischaracterizes the *Morton v. Mancari* issue raised in the Salt River Project's petition. Contrary to the United States' assertion, the issue of whether the tribal affiliation preference at issue in this case is a political classification, and not based on race or national origin, is properly before this Court.

Morton v. Mancari determined that the classification between Indians and non-Indians at issue in that case was political and not racial because it was "reasonably designed to further the cause of Indian self-government," and was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." 417 U.S. at 554-55, 94 S. Ct. at 2484-85. Relying on that determination, the Salt River Project argued that

Respondent's Title VII claim should be dismissed because the tribe-specific preference which the Navajo Nation required it to provide was even more clearly based on membership in "quasi-sovereign tribal entities," and not based on race or national origin.

The United States admits the Salt River Project's preference at issue in this case "could arguably be viewed as 'political.' " United States Brief at 9. It nevertheless contends that this Court's review is not warranted to correct the Ninth Circuit's error because "[t]he court of appeals did not address . . . whether an on-reservation employer's preference for members of a particular Tribe in conformity with an ordinance of that Tribe (or the terms of a lease of the trust property of that Tribe) should be viewed as a political classification." United States Brief at 9. Indeed, the United States suggests the Salt River Project did not even make that argument.

The United States is wrong. That is precisely the argument the Salt River Project has asserted throughout this litigation, including its petition for certiorari now pending before this Court. Pet. at 20 ("Although *Morton v. Mancari* did not deal with the precise issue in *this case*, the principles it established clearly apply *here*.") (emphasis added). The Salt River Project asserted its argument in the context of the facts of *this* case, which are: the Salt River Project's electric generating facility is located on tribal trust lands on the Navajo Reservation; the Navajo Nation has an ordinance that requires that a preference must be given to its members for work performed on its reservation; and the lease between the Navajo Nation and the Salt River Project contains a similar preference. Accordingly, the facts of this case are inextricably

connected with the reservation, and the United States' characterization of the issue so as to avoid review should be rejected.

IV. CONCLUSION

The United States' argument that review in this case is not warranted because the Ninth Circuit correctly decided the issues is itself based on a flawed analysis. When Title VII's Indian preference exemption is interpreted in the context of the Indian law analytical framework this Court has established, and when it is interpreted in light of the congressional purpose underlying that exemption (as identified by this Court in *Morton v. Moncari*) the Ninth Circuit's error is clear. The United States improperly ignores both the applicable analytical framework and Congress' intent. Accordingly, the Salt River Project's petition should be granted.

Respectfully submitted,

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